Champion International Corporation *and* Tommy Scogin. Case 10–CA–24746

May 28, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On November 20, 1990, Administrative Law Judge J. Pargen Robertson issued the attached decision and on December 4, 1990, he also issued an erratum to that decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Champion International Corporation, Courtland, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Keith Jewell Esq., for the General Counsel.
Denis E. Cole Esq., of Stamford, Connecticutt, for the Respondent.

DECISION

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Decatur, Alabama, on October 2, 1990. The charge was filed on May 7, 1989. The complaint, which alleges that Respondent engaged in conduct violative of Section 8(a)(1) of the National Labor Relations Act (Act), issued on June 27, 1990.

Respondent admitted that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act; that it is engaged in the manufacture of paper from wood pulp at its place of business in Courtland, Alabama; and that, during the past calendar year, a representative period, it sold and shipped from its Courtland facility, finished products valued in excess of $50,000 directly to customers located outside the State of Alabama.

I make the following findings on the basis of the entire record, my observation of the demeanor of witnesses, and after consideration of briefs filed by Respondent and General Counsel.

The material events stemmed from activities of Respondent's employee Tommy Scogin on November 16, 1989. An employee from another work area gave Scogin a prounion newsletter. Scogin made Xerox copies of the newsletter and placed those copies in areas where they could be picked up by other employees. Because of that action, Respondent suspended Scogin for 30 days.

Tommy Scogin testified that he holds the position of 33/34 Coated Inspector and, as such, he does quality control work in both labs 33/34 and 30/31. Scogin has two lockers, one in lab 33/34 and one in lab 30/31.

Scogin is financial secretary-treasurer for Local 193 of the United Paperworkers International Union (Union).

Several different editions of a prounion newsletter, Between the Fence Posts, also known as Big Ed Potts, were written by an anonymous author. The record revealed that it was common practice for employees to be given one or more copies of the latest edition of the newsletter for copying and distribution to other employees.

Danny Morris, an employee of Respondent and president of Local Union 193, testified that Respondent employs some 1250 hourly employees at its Courtland, Alabama facility and that ''give or take a hundred or more,'' editions of Between the Fence Posts have been distributed. When asked by whom had the newsletters been distributed, Morris testified:

> Different people. Most of the time, we didn't know how they [the newsletters] got in our department.
>
> Sometimes maybe a member of the Maintenance Department would drop by with some copies, put them in break areas. Sometimes foremen in our department.

Scogin testified that he did not know the employee who gave him the newsletter, (Between the Fence Posts, number 83), on November 16. Scogin made some 70 to 75 copies of that newsletter and placed those copies for other employees to pick up at their leisure.

Respondent, was told by a secretary, Donna Peck, that she had seen Scogin going into one of Respondent's Xerox rooms and that she had found what appeared to be the original copy of ''Between The Fence Posts,'' number 83, on the copying machine.

On November 19, 1989, Respondent suspended Tommy Scogin. Subsequently, he was given the following letter:

> On Thursday, November 16, 1989, you were seen by another employee, making copies on the Xerox machine located in the office behind No. 31 Paper Machine. This employee, subsequently found the original of ''Between the Fence Posts,'' No. 83, in the machine and a copy of this document in the output tray. This *original* document, together with a signed statement detailing the above events, was given to Charles Adams by the employee on November 17, 1989.
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> A meeting was held with you on Sunday morning, November 19, 1989. Present at this meeting were:
>
> Mr. Danny Morris, President of Local 193
> Mr. Eddie Story, Vice President of Local 193
> Mr. Hillman Locklayer, Q.C. Superintendent
> Mr. Bill Mann, Q.C. Foreman
> Mr. Dave Huffman, Labor Relations Supervisor
> Mr. Charles W. Adams, Human Resources Manager

You were advised of the reason for the meeting, and asked for your version of the events surrounding your possession of the original ''Between the Fence Posts,'' No. 83. You stated that it along with copies of No. 83, had been given to you by someone ''. . . in Cutsize . . .'' You were unable to identify this person either by name or description. This exchange purportedly took place sometime after 3:00 p.m. on November 16, 1989, in the vicinity of the No. 33 Paper Machine Coater. You did state that you had run ''. . . 70–75 . . .'' copies of No. 83, and had put the copies on a table in the No. 33 Q.C. Lab. You further stated that you had at times run copies of other ''Between the Fence Posts'' documents, using *originals* to make copies on occasion. You denied that you were the author of No. 83, or for that matter, any of the ''Between the Fence Posts'' Bulletins. You also denied being ''Ed Potts.'' At the conclusion of the meeting you were suspended pending further Company investigation.

We subsequently began our investigation in an effort to verify your account of the events of November 16, 1989. This necessitated another meeting with you on November 21, 1989. Present at this meeting were: Mr. Emory Barnette, International Representative of the UPIU; Mr. Danny Morris, Mr. Dave Huffman and Mr. Charles W. Adams. At this meeting you advised us that (1) ''Cutsize'' really meant to you Converting/-Shipping/Warehousing area, and (2) the only copies you ran on No. 31 Machine Xerox were copies of a football pool, the copies of No. 83 being run on the Xerox machine located in the No. 33 Machine complex. Following this meeting, employees on ''A'' shift and ''D'' shift in Cutsize, Roll Finishing, Shipping and Warehousing were interviewed on November 24, 1989, November 28, 1989 and November 29, 1989. The purpose of the interviews was to try to locate the employee who allegedly gave you the original of No. 83 and thus substantiate your version of what transpired. Although 63 employees were interviewed, we could find no one who would admit to being around the No. 33 Coater on the afternoon of November 16, 1989, and further, no one would would [sic] verify giving you the original of No. 83.

At the completion of our investigation, we reviewed all of the results of the investigation and we have come to the following conclusions:

1. You acknowledge that you did run a substantial number of copies of No. 83 of ''Between the Fence Posts'' and place them so they were distributed. These copies were run from an original document, i.e., the original of Bulletin No. 83. You were a principal source in the distribution of Bulletin No. 83.

2. You further acknowledge that you have been instrumental in the distribution of other editions of ''Between the Fence Posts'' including, at times, making copies from originals. Further, you indicate you are unable to identify by either name or description the persons who gave you these original documents.

3. Various editions of ''Between the Fence Posts'' reproduced and distributed by you contain material that is derogatory, abusive, offensive and insulting to specific, named employees. Some of this material contains ethnic slurs. Other materials advocates actions and activities designed to adversely impact mill operations. None of these kinds of materials are protected or are legally or contractually permitted.

4. You had been counseled by Boyd Arnold about being out of your work area, and Boyd had specifically mentioned to you that you needed your supervisor's permission to go from the No. 33 Q.C. area to the No. 31 Q.C. Lab. You did not secure Bill Mann's approval to go to the No. 31 Q.C. Lab on November 16, 1989.

Based on these conclusions, we find that you have violated the following Rules for Employee Conduct: Rule No. 2; Rule No. 22; Rule No. 25; and Rule No. 33. We in no way disagree with your right or the right of any other employee to express, in an appropriate manner, his or her opinion of collective bargaining negotiations or Company policies. However, by your own admission you left your work area and utilized company equipment to reproduce and distribute which have directed derogatory, abusive and defamatory insults and ethnic slurs at various individuals and encourage inappropriate actions against the Company by individual employees. Were there additional evidence to indicate that you were an author of the statements, termination would be the appropriate penalty.

We have decided, that you will receive a disciplinary lay-off of one (1) month to extend from your initial suspension pending investigation until Monday, December 18, 1989; you will be permitted to return to work on that date on your regular shift. It is our expectation that you will not be involved in any activities of a like nature in the future. Moreover, you should understand that any further violation of Company rules, or any other unacceptable behavior, will result in your termination.

Employees Scogin, Charles Mitchell Compton, and Delane Bradford, testified that until November 16, 1989, Respondent customarily permitted employees to use its copying machines to copy personal items including religious items such as church bulletins, betting pools and issues of Between The Fence Posts. Until it disciplined Scogin, no other employee had been disciplined for using Respondent's copying machines to copy personal items even though the evidence illustrated that Respondent's supervisors have often times witnessed employees copying personal, not business related, materials.

Respondent contended that Scogin engaged in unauthorized use of Respondent's equipment and that Scogin was out of his work area on November 16, when he was copying number 83 of Between The Fence Posts. Boyd Arnold testified that while he was Scogin's temporary foreman in place of Bill Mann, he talked to Scogin several days before November 16, about Scogin being out of his work area. Scogin was told by Arnold, that he was not to leave his specific work area without permission. Scogin admitted that Arnold did talk to him.

As to what constituted Scogin's work area, his immediate supervisor, shift supervisor and foreman Bill Mann, testified that in November 1989, Scogin's work area was the 33/34 Lab. Mann also testified that after he returned to work and learned that Arnold had told Scogin not to leave his work area without permission, he told Scogin that Scogin had per-

mission to go to the 31 Lab. Mann admitted that by going to his locker in the 30/31 Lab, Scogin would not have gone outside his work area.

Respondent offered three written disciplinary action statements regarding disciplinary actions against other employees.

On July 20, 1990, employee Doug Rhodes, was observed in an area that was not his normal work area. When he was asked why he was in the area, Rhodes ''directed profanity at (the inquiring supervisor) and made an insulting and obscene gesture toward him.'' Although Rhodes did have permission to be out of his work area on that occasion that fact was unknown to the inquiring supervisor. Rhodes was given a 15-day suspension. In a letter announcing Rhodes' suspension, Respondent mentioned Rhodes' conduct toward the supervisor, a prior oral reprimand, excessive absenteeism in 1989 and 1990, and a prior discharge from which Rhodes was reinstated on November 4, 1987.

On November 3, 1989, employee Houston Goines was suspended for 30 days after a supervisor observed a heated exchange between Goines and another employee. The two employees admitted to the supervisor that the heated exchange was precipitated by physical contact between them. Goines was advised of his suspension in a letter which set out the grounds including the fact that Goines had received a written reprimand on April 7, 1989, for ''threatening, intimidating, coercing other employees; interfering with the activities of another employee in the performance of his work; or directing abusive, vile or insulting remarks to or about another employee on Company premises at any time;'' and a 3-day suspension on May 22, 1989, for failure to follow the instructions of his supervisor.

Employee Don West was suspended for 30 days by letter dated January 14, 1986. The letter stated that West had been warned repeatedly during the past few months regarding absenteeism; that he received a written reprimand on November 12, 1985, and a 5-day disciplinary suspension of November 22, 1985. According to the letter, West admitted coming to work in ''an unrested condition which has prevented you from performing your job as effectively as you are capable of doing.'' The letter continued,

> On Thursday, January 9, 1986, you had a friend call at 6:55 a.m. and state that you had been arrested for DUI and would not be released from jail until 7:30 a.m. Your friend requested a day of vacation for you, but that was denied. Your friend was told to advise you to call in upon your release from jail. You called at 8:55 a.m., and you were instructed to report to work. You arrived at 10:00 a.m. A meeting was held with you, Keith Williams, Rufus Goines and I attending. During the meeting, you stated again that you were arrested and elaborated that you were probably taken in because the police were two young officers and you ''got smart with them.'' You said that your blood alcohol content was .011. Because of inconsistencies in your story, local police departments were contacted. They had no record of your arrest.
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> With Rufus Goines (Union Steward), Keith Williams, Larry Andrews and me present, you were contacted by phone on Friday, January 10, 1986. During that phone conversation, you admitted that you were not arrested on the previous day and that you had made up the story because you had been out late and you were in no shape to come to work. A follow-up meeting was scheduled.

Credibility

Tommy Scogin: Scogin appeared to testify in a straightforward manner. Nothing was brought out on cross-examination which appeared to show inconsistencies in Scogin's testimony. As to one issue, the question of Scogin copying a football pool, Scogin's prehearing affidavit did not include discussion of that issue.

Respondent, in its brief, argued that Scogin's failure to include the football pool in his pretrial affidavit, shows that Scogin concocted that story after he gave his affidavit to an NLRB agent. However as shown above, Scogin's suspension letter shows that Scogin told Respondent that he had copied a football pool on Respondent's Lab 30/31 Xerox machine on November 16, 1989. According to the suspension letter written by Hillman Locklayer, Respondent's superintendent of quality control, Scogin told Respondent that he had copied a football pool on the Lab 30/31 Xerox machine during a meeting on November 21, 1989.

Therefore, it is apparent that Scogin had not, as Respondent argued, concocted the football pool matter at a later date.

I was impressed with Scogin's demeanor. Moreover, he appeared to readily admit matters which were obviously harmful to his position. For example he readily admitted that he had made some 70–75 copies of the number 83 newsletter on Respondent's copying machine. I found Scogin to be a candid witness and I credit his testimony.

Charles Adams: I found Adams' testimony to be believable in most areas. However, Adams testified that Tommy Scogin admitted copying and distributing one specific Between the Fence Posts newsletter, number 21, in addition to number 83. That testimony is not consistent with the testimony of anyone else who attended those meetings regarding Scogin's suspension, on November 19 and 21, 1989.

Tommy Scogin specifically disputed that testimony.

Respondent's superintendent of quality control, Hillman Locklayer, the official who signed Scogin's suspension letter, testified that the only specific newsletter he knew that Scogin had copied and distributed, was newsletter number 83.

The above shows a serious problem with Adams' testimony. Due to that and my observation of Adams' demeanor, I am unable to credit Adams' testimony to the extent it conflicts with credited evidence.

Donna Peck: Peck's testimony appeared candid. I was impressed with her demeanor.

However, I do not find that Peck's conclusions regarding her observations were necessarily supported by those observations. For example, Peck observed Tommy Scogin using the Xerox machine in the lab 30/31 Xerox room. Subsequently, ''about maybe 10 minutes'' after Peck left the copying room she heard the Xerox machine cut off. Peck did not see Scogin during that ''10 minutes'' period and she did not see him leaving the Xerox room.

Peck then went into the Xerox room and discovered an original of Between the Fence Posts newsletter number 83 on the Xerox machine. The Xerox machine was flashing ''Check Paper Tray 1'' and Peck, after complying with the machines instructions, noticed that the machine produced copy number 43 out of 50 planned copies. Later, Tommy Scogin stuck his head in the door to the Xerox room. Peck

concluded from those observations that Scogin had been making 50 copies from an original of number 83 of the newsletter.

Scogin did not deny that he had made copies of newsletter number 83. However, Scogin testified that he made those copies on the lab 33/34 Xerox machine rather than on the lab 30/31 Xerox machine. Scogin also testified that he made some 70 to 75 copies, rather than 50.

Scogin admitted using the lab 30/31 Xerox machine when observed by Donna Peck, but, according to Scogin, he was copying a football pool given him for copying by employee Delane Bradford. Bradford corroborated Scogin in that regard.

> Well, I was working in the 33/34 Lab and Tommy [Scogin] said he was going to his locker at the 30/31 Lab and if I needed anything, and I asked him to run off some copies of that (football pool) while he was over there.
>
> Q: Why didn't you make those copies [yourself] in Lab 33/34?
>
> A: I had gone in there to make the copies, or gone down the hall and the door was closed to the foreman's office where the copying machine is. I looked through the window and there was several foremen and, I think, a superintendent or two in there. And they were having a meeting of some sort, so I didn't want to disturb them or anything like that.

A close examination of Peck's observations, as opposed to her conclusions, shows that both her observations and Scogin's testimony could be correct. It is possible that while Peck was out of the Xerox room for the time recalled by her, that Scogin finished his copying of the football pool, left the Xerox room, and another employee entered and made copies of the number 83 newsletter, leaving when the machine ran out of paper.

The record evidence illustrated that it is customary for numerous employees to copy editions of the Between the Fence Posts newsletter on Respondent's machines.

It appears that the above determinations are not critical to this case in view of Scogin's admissions that he did make copies of edition number 83 of the newsletter. Nevertheless, I am unable to find that Peck's conclusions were sound in view of the other possibilities mentioned above. I do find that she testified truthfully regarding her observations on November 16.

Danny Morris: Danny Morris appeared to testify in a straightforward manner. I was impressed with his demeanor. There was nothing in his testimony which caused me to question his honesty. I credit his testimony.

Charles Mitchell Compton Jr.: Charles Mitchell Compton appeared to testify truthfully. There were no apparent conflicts between his testimony on direct and his testimony on cross examination. Respondent did not rebut Compton's testimony. I was impressed with Compton's demeanor. He is currently employed by Respondent. I credit the testimony of Compton.

Delane Bradford: Delane Bradford, who is currently employed by Respondent, appeared to testify in a straightforward manner. His testimony was unrebutted and there were no apparent conflicts in his testimony. I was impressed with his demeanor and I credit his testimony.

Findings

Before November 1989, the Respondent and the Union, United Paperworkers International Union, and its Locals numbers 193, 1137, and 1161, had been party to collective-bargaining contracts. The last of those contracts indicated an expiration date of June 16, 1989. That contract was extended while the parties negotiated toward a new agreement. On October 29, 1989, Respondent gave 10 days' notice that it would not agree to further extension and the contract expired. Against that background, several editions of the newsletter, Between the Fence Posts, were published during the fall, 1989.

Between the Fence Posts was a newsletter written by an anonymous person or persons. Several editions of the newsletters were received in evidence. Those editions illustrate that the newsletters were written from a prounion standpoint. The newsletters routinely complained about Respondent's actions as being, allegedly, against the interest of employees and the Union.

The essential questions behind the complaint allegations center around the contention that Respondent suspended Tommy Scogin because Scogin made copies of newsletter number 83 and placed those copies out for other employees.

The first issue for consideration is one of whether by copying and placing out for distribution, newsletter 83, Scogin was engaged in activity which falls within the scope of the protection of Section 7 of the National Labor Relations Act.

> Section 7 of the Act, 29 U.S.C. section 157, guarantees to employees the right to engage in concerted activities such as the distribution of literature. If the literature bears a sufficiently close relationship to the employees' wages and working conditions, or ''otherwise (seeks to) improve their lot as employees through channels outside the immediate employee-employer relationship,'' *Eastex, Inc. v. National Labor Relations Board*, 437 U.S. 556, 565, 98 S.Ct. 2505, 2512, 57 L.Ed.2d 428 (1978), it is protected. ''[E]mployee appeals to legislators to protect their interests as employees are within the scope'' of section 7 protection. Id. 437 U.S. at 566, 98 S.Ct. at 2512–13. Interference with employee circulation of protected material in nonworking areas during off-duty periods is presumptively a violation of the Act unless the employer can affirmatively demonstrate the restriction is necessary to protect its proper interest. *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945).
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> . . . .
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> As recognized by the ALJ, Union Carbide *unquestionably* had the right to regulate and restrict employee use of company property. The Board's decision in this case does not challenge that basic property right. . . .
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> Herein, substantial evidence demonstrated that the reprimand was delivered to Keil not because she had violated company policy, but rather, solely in response to her prounion activities. . . . [*Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663, 664 (6th Cir. 1983).]

The circuit court in *Union Carbide*, supra at 661, also held that notices posted by employees on a company bulletin

board are protected by the Act ''even if abusive and insulting.'' See also *Mitchell Manuals*, 280 NLRB 230 (1986); *Trover Clinic*, 280 NLRB 61 (1986).

> decisions reflect the general rule that when employee conduct ''exceeds the bounds of legitimate campaign propaganda or is so disrespectful of the employer as seriously to impair the maintenance of discipline,'' the discipline meted out to the offending employee, even in the drastic form of discharge, does not constitute an unfair labor practice. *N.L.R.B. v. Blue Bell, Inc.*, 219 F.2d 796, 798 (C.A.5). ''An employee, by engaging in concerted activity, does not acquire a general or unqualified right to use disrespectful epithets toward or concerning his or her employer.'' (Ibid.) See also *Maryland Drydock Co., v. N.L.R.B.*, 183 F.2d 538, 539 (C.A. 4), to the effect that distribution of literature on Company premises ''hold[ing] officers and supervising officials up to ridicule and contempt, and which has a necessary tendency to disrupt discipline in the plant,'' is unprotected. Accord: *Indiana Gear Works v. N.L.R.B.*, 371 F.2d 273 (C.A. 7). [*Southwestern Bell Telephone Co.*, 200 NLRB 667, 670 (1972).]

In *Southwestern Bell*, supra, the Board found that employees' activity in wearing T-shirts with the slogan ''Ma Bell is a cheap Mother,'' was unprotected.

The Board, in *Caterpillar Tractor Co.*, 276 NLRB 1323, 1324 (1985), found that the below described cartoon of a supervisor involved unprotected activity:

> The figure's face has a porcupine snout, long fangs, and pointed ears. The figure's head is bulbous (perhaps crowned with a large ''afro''). The figure has a grossly obese trunk, clearly defined male genitals, and chicken-like legs and feet. The figure is urinating on a much smaller stick figure labelled ''common low life worker.'' The large figure wears a tie on which is written, ''I'm The Boss!'' The distorted portion of the large figure's trunk is labelled, ''FAT. MANAGEMENT BULGE.'' The large figure is emitting what are supposed to be five turds, separately labelled ''W-O-K-E-R.'' The figure is surrounded by the following statement:
>
> Hello, I'm Ray Kemper the Razorback. Oink.
>
> I'm so fat because I don't do a goddam thing except carry a clipboard. And fuck with you *lower* class.
>
> Oink. I'm on a 5-year plan. I might be a fat slob, but I'm mean!
>
> If you fuckers worked harder I could get fatter and have more fun drinking and spending my profit share!
>
> I need more production so I can buy more food to eat. I'm hungry.
>
> I'm mean, fat and hungry.
>
> If it was up to me I'd fire the whole shop.
>
> Burp. You basterds [sic] talk to each other and I'm going to forcefully stop it.
>
> If I find out who put this picture up of me I'll fire him.
>
> Oink. Fuck the workers.

In *Sahara Datsun*, 278 NLRB 1044, 1045–1046 (1986), the Board considered allegations a former employee made to a third person—in that case a bank that provided loans for the employer's customers to buy the employer's product. There the Board stated:

> In *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard Broadcasting)*, 346 U.S. 464 (1953), the Supreme Court held that even if employees are arguably engaged in concerted activity, if the nature of their actions involves a malicious attack on the product or reputation of their employer, their activity loses the protection of Section 7 of the Act and their subsequent discharge is for ''cause'' within the meaning of Section 10(c). In *Allied Aviation Service Co. of New Jersey*, the Board held that communications by employees to third parties who do business with the employer do not lose the Act's protection as long as the communications are related to a legitimate, ongoing labor dispute and they do not constitute ''a disparagement or vilification of the employer's product or its reputation.'' [Footnotes omitted.]

See also *United Aircraft Corp.*, 134 NLRB 1632, 1634 (1961); and *Government Employees*, 278 NLRB 378, 385 (1986).

Under *Sahara Datsun*, the applicable test includes questioning whether the communication constitutes ''a disparagement or vilification of the employer's product or its reputation.''

A circuit court, in *Midstate Telephone Corp. v. NLRB*, 706 F.2d 401 (2d Cir. 1983), held that an employer did not violate the Act by banning T-shirts emblazoned ''with a trademark, which was depicted as cracked in three places, and the words ''I SURVIVED THE MIDSTATE STRIKE OF 1971–75–79.''

However, in *Southern Maryland Hospital*, 293 NLRB 1209 (1989), the Board found a rule prohibiting ''derogatory attacks, was unlawful.

Also, in *Mack's Supermarkets*, 288 NLRB 1082, 1098 (1988), the Board sustained a holding of a violation where the employer prohibited its employees from wearing prounion baseball caps.

The Board has found that activities including letters to a newspaper and testimony before Congress, were protected even though the employee attacked his employer's integrity. The administrative law judge found that those attacks do not

> appear to be ''so disloyal, reckless, or maliciously untrue'' as to deny Sever the protection of the Act. While it is perhaps true that Japanese representatives of Respondent would find the letter more offensive than Respondent's American counterparts, it has not been demonstrated by Respondent that, absent obvious racist or other malicious slurs, ethnic sensitivities or subjective reaction alone are determinative of the Act's protection. Here, Sever is asserting his belief that the Respondent is not acting in an honorable fashion vis-a-vis its relationship with its employees. Concepts which the word ''honorable'' encompasses, such as honesty, fairness, and integrity, are customarily called into play, implicitly or explicitly, during labor-management relationships. Such rhetoric is understood to be a part of strike situations where the very livelihoods of individuals and the profitability of companies are being determined.

> And in such matters the Board permits a great deal of latitude. [Footnotes omitted.] [*Alaska Pulp Corp.*, 296 NLRB 1260, 1273 (1989).]

As shown above, the evidence available to Respondent illustrated that Tommy Scogin was shown to have been involved with only one specific newsletter. Scogin admitted that he had copied and distributed other newsletters but he testified that he did not know which other specific newsletters he had copied and distributed. As shown above, I have credited evidence showing that Respondent was not aware of any specific newsletters, other than number 83, and that evidence illustrated that, unlike the situation in *Alaska Pulp*, supra, Scogin was not responsible for the writing of the newsletter. That particular newsletter, number 83, includes the following language:

> BETWEEN THE FENCE POSTS
>
> HELLO CHAMPEEN EMPLOYEES, THIS IS BIG ED POTTS, and I got another message. The title of this one is, ''*THE TEST*.'' Champeen has put the hourly people and our UNION to ''*THE TEST*,'' and we've met the challenge, and passed ''*THE TEST*,'' and now it's time for Champeen to fold. Wednesday Champeens negotiating team went to meet with Andy Sigler and to deliver a message. ''*EITHER SHIT OR GET OFF THE POT*,'' because our UNION ain't backing down, only ''*PROFITS*'' is backing down. Champeen is amazed at the fortitude of the UNION at Courtland. Champeen brought Goon Guards and that didn't work, Champeen fenced off the hourly parking lot, built trailers, and that didn't work. Champeen terminated, then impleminted, and that didn't work. People just kept laughting, smileing, working and passed ''*THE TEST*.'' People's attitudes changed, but differently than Champeen and predicted. Champeen wanted us raging mad, so we would SABATOGE and DESTROY COMPENNY PROPERTY, but that didn't work. People got the ''*SO WHAT*'' attitude. Pressure has been put on by Bob Marlewski to vote. Bob's morning meetings notes always said, ''get with your Union representatives and ask to vote,'' but we passed that ''*TEST*'' too. Every move that Champeen made the Union was there to meet the challenge, and we passed all Champeen ''*TEST*.'' *COLLECTIVELY WE WILL WIN . . . PERIOD*. Bob Marlewski said, ''Ask me *NO* question and I'll tell you *NO* LIE, but ask me a question and I'll LIE.'' Watch your area's, and when you see BE&K or the Brown & Roots SCABS using hoses, shut them down, because that's your job. This is some more of Champeens intimediation. We have got to do our own work, and shut down foremen and supervisors too. In all this time of trouble, Champeen has managed to do ''ONE'' good deed. Instead of laying off or firing employees at Canton North Carolina, Champeen gave them jobs at Courtland, if they were willing to transfer. I've been told that they are good UNION people, and we need good Union people. We can meet every challenge Champeen throws our way, and we-will-win. We took ''*THE TEST*.'' Carl ''Wrankle Head'' Jones in shipping and warehousing must have some pull at Roanoak, because he says his sources say the vote was overwhelming in favor of the contract. Bob Marlewski said the same thing, but I haven't seen either one of them produce a vote count, so it looks like they LIED, like Lonnie Boy Skiles. Carl ''Wrankle Head'' Jones wants to get the F.B.I. to look for me, so Carl can personally fire me. Well, I hate to tell you ''Wrankle Head'' but you'll have to get in line behind Phil Luzier, and others. Maybe Carl ''Wrankle Head'' Jones wants to buy-off the F.B.I., since Champeen can't buy-off the Union. We can stand Champeens ''*TEST*'' and we won't back down. When Champeen wants to negotiate, we'll be at the table, but everything we ask for in the beginning is now *DOUBLED. PARTICIPATIVE MANAGEMENT/-THE FAMILY PLAN/FLEXABILITY/* and *TRAINING* will-not be a part of the package. *PREMIUM SUNDAY* will-not-buy *PARTICIPATIVE MANAGEMENT/THE FAMILY PLAN/FLEXABILITY/* or *TRAINING* and if Champeen still wants that junk, then we don't ''*VOTE*.'' *MY SENIORITY IS-NOT FOR SALE, AT ANY PRICE*. When Champeen terminated, and then implemented Champeen did us a favor. (1.) We're still working, (2.) If we get locked out for any reason other than SABATOGE, then we get back-pay for all the time we was off work, so Champeen is in a *NO-WIN* situation, if we just hold together. With us on the job ''*PROFITS*'' are down, but with us off the job ''*PROFITS*'' will ZAP to ZERO, and there goes Xerox. Xerox is a Company that want [sic] UNION-MADE-PAPER. This is one UNION that champeen is-not going to control. Andy Sigler might as well PUT THAT IN HIS PIPE & SMOKE IT. Bring on ''*THE TEST*'' Mr. Champeen. THIS IS BIG ED POTTS, AND YOU'LL BE HEARING FROM ME AGAIN REAL SOON.

There is no doubt from the above, that newsletter 83 involved union activity. Throughout the newsletter, it took the position of the Union against the actions of the Respondent. Its language dealt with the status of Respondent and the Union's contract negotiations and Respondent's decision to terminate the extended contract and implement new working conditions. Newsletter 83 implied that Supervisors Bob Marlewski and Carl Jones had lied to employees regarding the question of employees voting on a contract; and that Respondent was employing or contracting with scabs. The newsletter also ridiculed Supervisor Carl Jones by referring to him as ''Wrankle Head.''

Here the situation was similar to the situation in *Alaska Pulp*, supra. The Union was involved in a labor dispute with Respondent. That dispute had become heated following the Respondent's termination of the extended contract and its implementation of new working conditions. Newsletter 83 dealt exclusively with the labor dispute in its sometimes strong language which consistently attacked Respondent's position in the labor dispute.

The newsletter 83 language falls far short of the language and cartoon condemned in *Caterpillar Tractor Co.*, supra.

There was no showing that the alleged discriminatee, Tommy Scogin, made any effort to distribute the Between the Fence Post newsletters to anyone other than employees. Certainly as to the matters material to this proceeding, the evidence illustrated that Scogin limited his distribution to other employees. For that reason this matter is distinguish-

able from *Southewestern Bell*, and *Midstate Telephone Corp. v. NLRB*, supra, where T-shirts were worn in full view of the public; and from *Sahara Datsun*, supra, where publication was made to a business associate of the employer (i.e., a bank).

The Board recently considered questions similar to those above, in *El San Juan Hotel*, 289 NLRB 1453 (1988):

> The Supreme Court in *Jefferson Standard*, above, held that employee conduct involving a disparagement of an employer's product, rather than publicizing a labor dispute, is not protected. As *Jefferson Standard* and subsequent Board cases show, there is sometimes a fine line between raising highly sensitive issues that relate to terms and conditions of employment and those that relate to disparaging an employer's reputation. The leaflet found unprotected in *Jefferson Standard* was an employee handbill that contained a ''vitriolic'' attack on the quality of the employer's television broadcast and management policies. It made no reference to the pending labor dispute between the parties or to wages, hours, or working conditions; and it was not an appeal for public sympathy or support. Employees distributed the handbill on their picket line and on public property. Similarly, in *Sahara Datsun*, 278 NLRB 1044 (1986), enfd. 811 F.2d 1317 (9th Cir. 1987), the Board found that an employee's statements that the employer falsified customer credit applications, which were made to the bank that granted financing to the employer's customers, were unprotected. The Board found that the statements, although related to terms and conditions of employment, were, nevertheless, unsubstantiated assertions that could have ruined a long standing business relationship based on trust and fair dealing. *Sahara Datsun*, above. On the other hand, the Board in *Veeder-Root Co.*, 237 NLRB 1175 (1978), found that employee literature that was phrased in general political terms but made particular reference to the employer's activities regarding its employees and ended with the demand ''FIGHT WAGE CUTS AND SPEED UP!'' was sufficiently related to wages, hours, and conditions of employment to be protected.

The letter in question in *El San Juan Hotel*, accused the trustee of the Respondent employer of being irresponsible, and of being a dictator and wanting to close the hotel. The trustee was alleged to be in position to gain financially from the hotel's close.

I find that newsletter 83 falls within the scope of the rule discussed in *El San Juan Hotel*, and is protected under Section 7 of the Act. Newsletter 83 advocated the union positions and condemned the opposing position of Respondent and its language, while sometimes crude and unpleasant, does not justify exclusion from Section 7 protection. The newsletter must stand alone in view of my determination that Respondent did not know of any other specific newsletters which were distributed by Scogin. Newsletter number 83 was prepared and distributed among employees. Number 83 was not distributed to outsiders and there was no effort in the newsletter to injure Respondent's business.

In view of my finding that newsletter 83 constitutes protected activity, I shall now consider Respondent's argument that it was justified in suspending Tommy Scogin because Scogin engaged in misconduct.

In situations where an employee engaged in activity protected by Section 7 of the Act, is accused by the employer of engaging in misconduct, the rule is as follows:

> In cases of this type the proper standard for determining whether the law was violated was announced by the Supreme Court in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), and by the Board in *Rubin Bros. Footwear*, 99 NLRB 610 (1952). The Board recently restated that ruling in *K & K Transportation Corp.*, 262 NLRB 1481 (1982). In *K & K Transportation*, as well as in most other cases, the issues concerned alleged employee misconduct during a strike. However, the rule has also been applied in situations like the instant case in which employees were admittedly engaged in union activity. The basic general rule is that once it has been established that an employee is engaged in union or protected activity, the burden shifts to the employer who must demonstrate an honest belief that the employee was engaged in misconduct. Once an employer establishes an honest belief that the employees engaged in misconduct, the burden shifts back to the General Counsel to prove that the employee did not, in fact, engage in misconduct. [*Magnolia Manor Nursing Home*, 284 NLRB 825, 829 (1987).]

As shown in *Magnolia Manor Nursing Home*, supra, Respondent must show an honest belief through objective evidence, that Tommy Scogin engaged in conduct which was punishable under Respondent's practices. See *Brunswick Food & Drug*, 284 NLRB 663 (1987).

Respondent contends that Tommy Scogin violated several rules on November 16. In its November 30, 1989 letter to Scogin, shown above, Respondent asserts that Scogin violated the the following rules which were included along with other rules, as an appendix to the last collective-bargaining agreement:

> 2. Leaving one's job assignment, location, or department, except in the line of duty, or leaving the Mill without express permission of supervision.
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> . . . .
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> 22. Threatening, intimidating, coercing other employees; interfering with the activities of another employee in the performance of his work; or directing abusive, vile or insulting remarks to or about another employee on Company premises at any time.
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> . . . .
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> 25. Soliciting, collecting contributions or distributing literature of any description in work areas without permission of management.
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> . . . .
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> 33. Unauthorized or improper use of Company communications equipment.

The General Counsel, on the other hand, points to the testimony of Tommy Scogin, Mitch Compton, and Delane Bradford which shows that Respondent routinely permitted employees to leave their work areas to copy various documents on Respondent's Xerox machines. Compton and Bradford testified without dispute from Respondent, that super-

visors routinely permitted employees to copy various documents including religious matters, football pools, and other things including the prounion, Between the Fence Posts newsletters.

Current employee and president of the Local Union, Danny Morris, testified that he has been handling grievances for some 12 or 13 years and that Respondent has never said that employees are prohibited from copying personal matters on Company Xerox machines.

Compton, a current employee of Respondent, testified that he has regularly made copies of personal materials throughout the shifts at different times, in the presence of supervisors including Bennie Cole, Bill Thompson, and Wiley Reeves. Those materials copied by Compton included copies of the Between the Fence Posts newsletters. Compton testified that he has made anywhere from 25 to 75 copies at a time. On one occasion Superintendent on Coater Don Bowling told Compton that he wanted a copy of the newsletter Compton was copying, even if Compton had to stick it up under Bowling's door. Compton recalled that he has given copies of the newsletter to other supervisors including Gary Smith, Pete Nolan, Bennie Cole, Bill Thompson, and Compton's own foreman, Bill Mann. Compton was never told that he could not copy or distribute copies of personal materials.

Delane Bradford, who is currently employed by Respondent as a quality control inspector in labs 30/31 and 33/34, testified that employees routinely copy personal materials including

> Any type material you can think of; from religious to cartoons, jokes, magazine articles, newspaper articles, church bulletins.

Bradford testified that he has observed employees copying personal items such as those mentioned above, in the presence of members of management including Superintendent Glenn Woods, and Shift Foremen Bennie Cole, M. Q. Parker, Richard Allen, and Willis Pennington. Bradford has seen supervisors making copies of cartoons, jokes, and Big Ed Potts newsletters.

According to Bradford, he made copies of personal materials including newspaper articles, football pools, and union materials. He has copied personal materials in the presence of supervisors including Glenn Woods, Bennie Cole, Willis Pennington, Richard Allen, and M. Q. Parker.

Bradford has observed other employees distributing personal materials such as football pools, Big Ed Potts newsletters, dirty cartoons and jokes, and college football related cartoons and jokes, by leaving those materials laying around the work areas. According to Bradford that distribution was done in the presence of supervisors and, on occasion, he has observed one supervisor, Boyd Arnold, passing out cartoons and stuff.

Additionally General Counsel offered evidence showing that Respondent did not normally punish its employees because they left their work assignment areas. Mitchell Compton and Deland Bradford, testified that it is routine for them to move back and forth between labs 30/31 and 33/34 and that they have never been told by supervision that they needed permission to move between those two labs.

Bradford testified that after Scogin was suspended, Foreman Bill Mann

> told me that if I had to go to another lab, wherever I was working, if I needed to go to the other one, or my locker or anything, that was fine. If I needed to go out front to medical or to the concession area, that was fine. There was no problem with that.

Tommy Scogin admitted that he was told to stay in his work area but Scogin testified, as did Compton and Bradford, that labs 30/31 and 33/34 were in his work area.

Respondent does have a basic right to regulate and restrict employee use of company property. However, an employer may not use that basic right to discriminatorily restrict prounion activities. An employer may not invoke rules designed to protect its property from unwarranted use in furtherance of prounion activities while, at the same time, freely permit such use for non business related reasons. *Union Carbide Corp. v. NLRB*, 714 F.2d 657 (6th Cir. 1983); *Hussmann Corp.*, 290 NLRB 1108 (1988).

As to Respondent's contention that Scogin violated rule 2 (i.e., leaving one's job assignment, etc.), rule 25 (i.e., soliciting), and rule 33 (i.e., using communications equipment), the record evidence shows that it was Respondent's practice to permit employees to engage in the same type conduct engaged in by Scogin.

Before Respondent suspended Scogin, its practice was that rules 2, 25, and 33 were never enforced against employees because the employees used Respondent's Xerox machines during work, to copy and distribute non-work-related personal materials.

As to rule 22, as shown above, that rule states

> 22. Threatening, intimidating, coercing other employees; interfering with the activities of another employee in the performance of his work; or directing abusive, vile or insulting remarks to or about another employee on Company premises at any time.

In addition to its citation of rule 22, the suspension letter includes the following as one of four reasons for the suspension of Scogin:

> 3. Various editions of ''Between the Fence Posts'' reproduced and distributed by you contain material that is derogatory, abusive, offensive and insulting to specific, named employees. Some of this material contains ethnic slurs. Other materials advocates actions and activities designed to adversely impact mill operations. None of these kinds of materials are protected or are legally or contractually permitted.

Respondent by charging Scogin with violation of rule 22, and by making the allegations contained in item number 3, quoted above, holds out that Scogin was also being punished for materials contained in specific editions of Between the Fence Posts newsletters other than edition number 83.

On the basis of the entire record as credited, I find there was no evidence available to Respondent which tended to prove that Scogin had anything to do with the writing of any of the newsletters, or that he was responsible for the distribution of any specific newsletter other than number 83. The only evidence in that regard is the discredited testimony of Charles Adams that Scogin admitted that in addition to newsletter number 83, he also copied newsletter number 21.

Scogin admitted to Respondent that he had distributed other newsletters but Scogin told Respondent that he was unaware of any specific newsletters that he had copied for distribution, other than number 83. The record revealed that Respondent did not know of any other specific newsletter copied and distributed by Scogin.

I find that the evidence failed to show that Scogin was in any way responsible for newsletter number 21.

As to edition number 83, Scogin did nothing more than copy and place those copies out for the benefit of other employees. In that regard Scogin did nothing which had not been routinely permitted of other employees and, in fact, he did nothing more than engage in conduct similar to that of some supervisors. As shown above, supervisors copied and distributed personal materials including, on some occasions, copies of Between the Fence Posts.

I find that the evidence available to Respondent failed to support a finding that Respondent had an honest belief that Scogin engaged in misconduct. That evidence illustrated that Scogin did nothing other than conduct which was routinely permitted of other employees.

Additionally, the evidence shows that Tommy Scogin did not, in fact, engage in misconduct.

Finally, the evidence proved that Scogin was treated in a disparate fashion because of his protected activity of copying and distributing newsletter number 83.

CONCLUSIONS OF LAW

1. Champion International Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent, by suspending Tommy Scogin, violated Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As I have found that Respondent unlawfully suspended Tommy Scogin, I shall recommend that Respondent be ordered to immediately rescind the suspension of Scogin, without prejudice to his seniority or other rights and privileges.

I shall further recommend that Respondent be ordered to make Scogin whole for any loss of earnings he suffered as a result of the discrimination against him. Backpay shall be computed in the manner described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[1]

[1] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, it is hereby ordered that Respondent Champion International Corporation, Courtland, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending and otherwise discriminating against employees because of their union or other protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer its employee Tommy Scogin immediate rescission of the 30-day suspension which was imposed against him, and make Scogin whole for any loss of earnings, plus interest, suffered because of its illegal action.

(b) Remove from its files any reference to the suspension of Scogin and notify Scogin in writing that this has been done and that evidence of his unlawful suspension will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, and timecards, personnel records, reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Courtland, Alabama, copies of the attached notice.[3] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT suspend our employees because of their activities on behalf of International Paperworkers of America, AFL–CIO, CLC, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate rescission of his 30-day suspension, to our employee Tommy Scogin, without prejudice to his seniority or other rights and privileges.

WE WILL make Tommy Scogin whole for all losses of earnings he may have suffered by reason of our discrimination against him.

WE WILL remove from our records any reference to our suspension of Tommy Scogin and WE WILL notify Scogin in writing of our action in that regard.

CHAMPION INTERNATIONAL CORPORATION